Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-869

IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, et al.,

Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT AMERICAN MOTORISTS INSURANCE COMPANY

STEWART DALZELL
(Counsel of Record)
MARK M. WILCOX
TYBE A. BRETT
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Counsel for Respondent American Motorists Insurance Company

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

I. Whether this Court should resolve a conflict among the circuits as to the proper choice of law rules for cases presenting important issues of state law insurance contract interpretation, arising out of the flood of asbestos-related personal injury claims.

II. Whether the court below properly applied outcome-determinative choice of law rules of the forum state and thereafter applied the correct state law.

III. Whether the decision below, which was tantamount to finding federal common law in a diversity case, encourages forum-shopping.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	7
I. There Is a Conflict Among the Circuits as to the Appropriate Principles to Apply to Complex Choice of Law Issues	7
II. The Court Below Was Required to Apply the Choice of Law Rules of the Forum State	8
III. Failure to Resolve the Issues Raised Herein Will Lead to Forum-Shopping	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:	Page
Aldrich v. Aldrich, 375 U. S. 249 (1963)	10
Allstate Insurance Co. v. Hague, 449 U. S. 302 (1981)	11
Bellotti v. Baird, 428 U. S. 132 (1976)	10, 11
Borel v. Fibreboard Paper Products Corp., 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 419 U. S. 869 (1974)	4
Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535, 392 N. E. 2d 1043 (1979)	10
City of Milwaukee v. Illinois, 451 U. S. 304 (1981)	12
Clay v. Sun Insurance Office, Ltd., 363 U. S. 207 (1960)	10
Clay v. Sun Insurance Office, Ltd., 377 U. S. 179 (1964)	11
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949)	9
Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976)	11
Commercial Union Insurance Co. v. Pittsburgh Corning Corp., et al., No. 81-2129, slip op. (E. D. Pa. Dec. 4, 1981)	13
Day & Zimmermann, Inc. v. Challoner, 423 U. S. 3 (1975)	9
Dresner v. City of Tallahassee, 375 U. S. 136 (1963)	10
Eagle-Picher Industries, Inc. v. American Employers Insurance Co., No. 82-1841 (D. D. C. filed June 30, 1982)	14
England v. Louisiana State Board of Medical Examiners, 375 U. S. 411 (1964)	11
Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938)	8, 9, 13, 14
E. R. Squibb v. American Motorists Insurance Co., No. 82-0740 (D. D. C. filed July 21, 1982)	14
Guaranty Trust Co. v. York, 323 U. S. 99 (1945)	9
Hanna v. Plumer, 380 U. S. 460 (1965)	13
Hart v. State Farm Mutual Automobile Insurance Co., 313 F. Supp. 289 (D. Mass. 1970)	9
Huddleston v. Dwyer, 322 U. S. 232 (1944)	12

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F. 2d 1212 (6th Cir. 1980), *aff'g* 451 F. Supp. 1230 (E. D. Mich. 1978), *cert. denied*, 454 U. S. 1109 (1981) 4, 5, 6, 8, 11

Kaiser Steel Corp. v. W. S. Ranch Co., 391 U. S. 593 (1968) 11

Kearsarge Metallurgical Corp. v. Peerless Insurance Co., 1981 Mass. Adv. Sh. 702 (1981) 10

Keene Corp. v. Insurance Co. of North America, 667 F. 2d 1034 (D. C. Cir.), *rev'g* 513 F. Supp. 47 (D. C. D. C. 1981), *cert. denied*, 455 U. S. 1007 (1982) 4, 7, 10, 12, 14

Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., 313 U. S. 487 (1941) 9, 13

Lehman Brothers v. Schein, 416 U. S. 386 (1974) 10, 11, 13

Louisiana Power and Light Co. v. City of Thibodaux, 360 U. S. 25 (1959) 11, 13

National Distillers and Chemical Corp. v. Department of Energy, 487 F. Supp. 34 (D. Del. 1980) 14

National Gypsum Co. v. American Motorists Insurance Co., No. 82-1332 (D. D. C. filed May 13, 1982) 14

Nolan v. Transocean Air Lines, 365 U. S. 293 (1961) 12

Porter v. American Optical Corp., 641 F. 2d 1128 (5th Cir.), *cert. denied*, 454 U. S. 1109 (1981) 4, 8

Searls v. Standard Accident Insurance Co., 316 Mass. 606, 56 N. E. 2d 127 (1944) 9

Swift v. Tyson, 16 Pet. 1 (1842) 8

Wallis v. Pan American Petroleum Corp., 384 U. S. 63 (1966) 12

West Side Motor Express, Inc. v. Finance Discount Corp., 340 Mass. 669, 165 N. E. 2d 903 (1960) 9

Woods v. Interstate Realty Co., 337 U. S. 535 (1949) 9

Zurich Insurance Co., et al. v. Raybestos-Manhatten, Inc., No. 78 L 8760, Asbestos Lit. Reporter, p. 4, 991, May 28, 1982 (Cir. Ct. of Cook County, Ill., 1982) 6, 10, 12

TABLE OF AUTHORITIES (Continued)

Others:	Page
U. S. Const. Art. III, § 2	3
U. S. Const. Art. IV, § 1	11
U. S. Const. amend. XIV	11
Judiciary Act of 1789, ch. 20, sec. 34, 1 Stat. 92, *repealed by* Rules of Decision Act of 1948, ch. 646, § 1652, 62 Stat. 869, 944	8
Massachusetts Supreme Judicial Court Rule 1:03 (1982)	10
Rules of Decision Act, 28 U. S. C. § 1652 (1976)	3, 8, 12
Supreme Court Rule 28.1	1
28 U. S. C. § 1254(1) (1976)	2
28 U. S. C. § 1359 (1976)	14
28 U. S. C. § 2201 (1976)	3

No. 82-869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, et al.,
Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
Respondents.

BRIEF OF RESPONDENT AMERICAN MOTORISTS INSURANCE COMPANY *

Respondent American Motorists Insurance Company submits this brief in response to the Brief of Eagle-Picher Industries, Inc. in Opposition to Petition for a Writ of Certiorari and to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

* In compliance with Sup. Ct. R. 28.1, American Motorists Insurance Company ("AMICO") states that its parent corporation is Kemper Corporation and that its subsidiaries are: Amico Realty Corporation; Federal Kemper Insurance Company; Federal Kemper Life Assurance Company; American Protection Assurance Company; Triangle Outpost Estates; BBC Associates, Inc.; Lloyd Industrial Sul Americano Cia de Seguros; Central Mortgage Company; and National Agents Service Company, Inc. AMICO is indirectly related, through Kemper Corporation, to Lumbermens Mutual Casualty Company, an Illinois mutual insurance company.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 682 F. 2d 12. The opinion of the United States District Court for the District of Massachusetts is reported at 523 F. Supp. 110. All the opinions below are appended.

JURISDICTION

The opinion and judgment of the First Circuit was entered on June 30, 1982. On August 30, 1982 petitions for rehearing were denied and on September 1, 1982 suggestions for rehearing en banc were denied.

On November 19, 1982, Justice Brennan signed an Order extending the time of Eagle-Picher Industries, Inc., to file a petition for writ of certiorari to and including January 27, 1983.

Under cover of letter dated December 7, 1983, the Clerk of this Court granted the requests of Liberty Mutual Insurance Company and American Motorists Insurance Company to file responses to the petition for a writ of certiorari in case No. 82-869 and to the anticipated petition of Eagle-Picher to and including February 25, 1982. The within response is being filed pursuant to this extension.

On December 29, 1982, Eagle-Picher Industries, Inc., filed a conditional cross-petition for certiorari in No. 82-1097, and a brief in opposition to the Froude Petition in No. 82-869.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The diversity clause of Article III, Sec. 2, of the Constitution of the United States provides:

> The judicial Power shall extend to all Cases, in Law and Equity . . . to Controversies . . . between Citizens of different States. . . .

The Rules of Decision Act, 28 U. S. C. § 1652, sets forth the appropriate law to be applied in diversity cases:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Title 28 U. S. C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Recently, three Circuit Courts of Appeals, in addition to the First Circuit in the case below, have had the opportunity to consider the coverage provided under general liability insurance policies for asbestos-related personal injury claims. *See Keene Corp. v. Insurance Co. of North America*, 667 F. 2d 1034 (D. C. Cir.), *rev'g* 513 F. Supp. 47 (D. C. D. C. 1981), *cert. denied*, 455 U. S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F. 2d 1128 (5th Cir.), *cert. denied*, 454 U. S. 1109 (1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F. 2d 1212 (6th Cir. 1980), *aff'g* 451 F. Supp. 1230 (E. D. Mich. 1978), *cert. denied*, 454 U. S. 1109 (1981). These cases present difficult and novel issues of state law which the federal courts, in exercising their diversity jurisdiction, have not resolved consistently with firmly-established principles of federalism.

The instant action for declaratory judgment requested a determination of whether coverage under insurance contracts between Eagle-Picher Industries, Inc. ("Eagle-Picher") and its insurers, including respondent American Motorists Insurance Company ("AMICO"), should be afforded on an "exposure" or a "manifestation" basis. This action raises issues almost identical to those raised in the many other actions concerning insurance coverage for asbestos-related personal injury, listed in Appendix C of the Petition of Froude, et al., No. 82-869 ("Froude Petition"), as well as for other types of personal injury appearing long after exposure to the insured's product.[1]

These actions follow in the wake of *Borel v. Fibreboard Paper Products Corp.*, 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 419 U. S. 869 (1974), which signifi-

1. *See, e.g.*, Froude Petition, at 9, note 7.

cantly expanded manufacturers' liability for injuries arising from exposure to their products. Because of the complexity of the issues of insurance contract interpretation, the parties inevitably turned to the courts to decide the applicability of concurrent insurance policies, entered into in many different states, frequently involving different policy language, to expanding tort liability which in itself is not uniform in every state.

For cases brought in federal court, the critical threshold issue is the determination of which state's law applies to the issues before it. The district court in the instant case glossed over the complex choice of law problem in a footnote. Finding that there was no true conflict among the law of Ohio, Illinois, or England (all potentially applicable laws), it did not reach the question of which state's law would be applied to the insurance contracts before it. App. at A35, n. 5.

The Court of Appeals for the First Circuit was equally cursory on the choice of law issue. Although the First Circuit concluded that the basic principles of interpretation may not vary significantly from one jurisdiction to the next, it sought to be consistent with Illinois and Ohio law. App. at A6, n. 2. And although the First Circuit essentially endorsed the district court's application of state law, the Court of Appeals *sua sponte* modified the district court's judgment as to the appropriate definition of the manifestation date, a result assertedly reached for administrative convenience. App. at A21-23.

Moreover, although the courts below purportedly resolved the issues in accordance with Illinois law, the Sixth Circuit in *Forty-Eight*, 633 F. 2d at 1219-20, also applied Illinois law and came to precisely the opposite result. Indeed, an Illinois state court, considering issues in all material respects identical to those in the instant case, has rejected the manifestation approach and suggested it will

apply the law set forth in *Forty-Eight*. *See Zurich Insurance Co., et al. v. Raybestos-Manhatten, Inc.*, No. 78 L 8760, Asbestos Lit. Reporter, p. 4,991, May 28, 1982 (Cir. Ct. of Cook County, Ill., 1982), App. at A43-54.

Also, the facts of this case strongly suggest that the action was brought in Massachusetts specifically to avoid a *Forty-Eight* result. The only basis for venue in Massachusetts was the fact that Liberty Mutual Insurance Company ("Liberty") is based there. Yet there was evidence submitted which strongly suggested that Eagle-Picher, the plaintiff below, had resolved its dispute with Liberty.[2] However, rather than file this action in Ohio, the state of Eagle-Picher's incorporation and principal place of business, Eagle-Picher named Liberty as a defendant so that Massachusetts would be a proper venue and the Sixth Circuit, which decided *Forty-Eight*, would be avoided.

2. *See* Submission of the Froude Defendants and the Defendant, American Motorists Insurance Company Regarding Certain Evidence to be Offered at Trial and in Support of their Joint Motion for Pre-Trial Rulings, at 47, filed below in the District of Massachusetts on August 22, 1980; Froude Petition, at 5-6, 15-17.

ARGUMENT

I. There Is a Conflict Among the Circuits as to the Appropriate Principles to Apply to Complex Choice of Law Issues.

The four Circuit Courts of Appeals that have interpreted general liability insurance policies as applied to asbestos-related personal injury claims have used different principles in resolving the question of which state's law applies to the issues.

As noted above, the First Circuit here paid lip service to choice of law issues by determining that the basic principles of interpretation do not vary significantly among jurisdictions, and thereafter claimed to be consistent with Illinois and Ohio law. App. at A6, n. 2. In fact, however, the issues were not resolved consistently with applicable state law. *See infra* pp. 10-11.

The District of Columbia Circuit in *Keene* concluded that "[n]one . . . of these states [whose laws potentially apply] gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of laws. . . . Therefore we need not engage in the exercise of identifying which jurisdiction's law governs." 667 F. 2d at 1041 n. 10 (citations omitted). Judge Bazelon in *Keene* then proceeded to develop a theory of coverage based upon the "reasonable expectations of the parties," despite the fact that this notion appears to be one commentator's interpretation of the appropriate law rather than the law of any particular jurisdiction with an interest in the issues raised in the *Keene* litigation. 667 F. 2d at 1041, 1042 n. 12. Thus, *Keene* applied its own notions of what the law should be,

despite the requirement that a federal court must apply applicable state law.

Only the Sixth Circuit in *Forty-Eight* and the Fifth Circuit in *Porter* demonstrated that they were applying the choice of law principles of the jurisdiction in which they sit, and thereafter applied the state law mandated. *See Forty-Eight*, 633 F. 2d at 1219-20; *Porter*, 641 F. 2d at 1144.

Contrary to the assertions in the Brief of Eagle-Picher in Opposition to Petition for a Writ of Certiorari, the widely-varying approaches of the Circuit Courts of Appeals to the choice of law issue present a conflict (or, at least, confusion) among the circuits on important federal issues. Failure to resolve the conflict will erode fundamental principles of federalism dating from the enactment of the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (and its successor, the present Rules of Decision Act, 28 U. S. C. § 1652 (1976)), and the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938). A Writ of Certiorari should issue so that this Court can decide what principles a federal court with diversity jurisdiction should use to decide a case where none of the potentially applicable precedent points to a particular result.

II. The Court Below Was Required to Apply the Choice of Law Rules of the Forum State.

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie*, 304 U. S. at 78. In so holding, this Court disapproved the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842), which had permitted federal courts exercising diversity jurisdiction freely to exercise their independent judgment as to what the common law of the state is, or should be, 304 U. S. 64, and

interpreted the Judiciary Act of 1789 to avoid an invasion into the rights "reserved by the Constitution to the several states." 304 U. S. at 80.

In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941), this Court stated that the conflict of laws rules to be applied by a federal court must conform to those prevailing in the state court in which it is located. It is not the role of the federal courts to enforce an independent "general law" of conflict rules, but rather to ascertain what the state law is, not what it ought to be. 313 U. S. at 496-97. *See also Day & Zimmermann, Inc. v. Challoner*, 423 U. S. 3 (1975). The objective of *Erie* and its progeny is to bring about the same result in state and federal courts because, for purposes of diversity jurisdiction, the federal court is simply another court of the state. *See, e. g., Woods v. Interstate Realty Co.*, 337 U. S. 535, 538 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555 (1949); *Guaranty Trust Co. v. York*, 326 U. S. 99, 108-09 (1945).

In the first instance, the court below here was required to determine the applicable law by using the choice of law rules of Massachusetts, the forum state. However, no mention is made in the district court or circuit court opinion of Massachusetts choice of law rules. Had the court below analyzed Massachusetts choice of law rules, it would have found that such rules for contracts are changing.[3] Massachusetts law affords a simple

3. A Massachusetts court, in the past, would apply the law of the state where the contract was made to issues concerning validity, interpretation and effect of the contract. *See, e.g., West Side Motor Express, Inc. v. Finance Discount Corp.*, 340 Mass. 669, 671, 165 N. E. 2d 903, 904 (1960); *Searls v. Standard Accident Insurance Co.*, 316 Mass. 606, 608, 56 N. E. 2d 127, 128 (1944). *See also Hart v. State Farm Mutual Automobile Insurance Co.*, 313 F. Supp. 289, 292 (D. Mass. 1970). However, the Massachusetts Supreme Judicial Court has suggested that in the near future, it

procedure to resolve this problem. Confronted with the unsettled state of the law, the courts below should have certified the issue of the choice of law rule to be used in the instant case to the Massachusetts Supreme Judicial Court, pursuant to Massachusetts Supreme Judicial Court Rule 1:03 (1982).

This Court has for years advocated the use of such procedures by the federal courts in deciding issues of changing law. *See Bellotti v. Baird*, 428 U. S. 132, 151 (1976); *Lehman Brothers v. Schein*, 416 U. S. 386 (1974); *Aldrich v. Aldrich*, 375 U. S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U. S. 136 (1963); *Clay v. Sun Insurance Office, Ltd.*, 363 U. S. 207, 212 (1960). Indeed, in *Lehman Brothers*, this Court noted that while resort to the certification procedure is not obligatory, it is particularly appropriate where the applicable state law is unsettled and the law to be applied is that of a distant state: "When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." 416 U. S. at 391.

The reason that the choice of law issue is so important here is that if Illinois law applies, Illinois precedent requires the application of the exposure theory to the AMICO policy. In the *Raybestos* case (opinion appended at A43), an Illinois trial judge has stated that he will reject the manifestation approach. *Forty-Eight,*

3. (Cont'd.)

will adopt an interest analysis in resolving conflict of laws questions in contract analysis. *See, e.g., Kearsarge Metallurgical Corp. v. Peerless Insurance Co.*, 1981 Mass. Adv. Sh. 702, 706 n. 7 (1981); *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535, 541, 392 N. E. 2d 1045, 1049 (1979).

decided under Illinois law, holds the same. 633 F. 2d at 1219-20. Thus the courts below could not have found that coverage is triggered by manifestation consistently with Illinois law.[4]

Under these circumstances, this Court in *Lehman Brothers* pointed out that "when state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn." 416 U. S. at 390 (footnote omitted). *See also Louisiana Power and Light Co. v. City of Thibodaux*, 360 U. S. 25 (1959); *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U. S. 593 (1968); *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 432 (1964) (Justice Douglas, concurring). Abstention has been deemed appropriate in cases presenting questions of state law that bear on policy problems of substantial public import and whose importance transcends the result in the case then at bar, particularly when the identical issues are about to be decided by the courts of the state whose law applies. *See Bellotti, supra; Louisiana Power and Light, supra.*[5] Given the thousands of asbestos-related claims pending against Eagle-Picher alone, the public importance here is beyond cavil.

4. The problem of choice of law becomes all the more important when the forum has little or no interest in the outcome of the litigation. In some instances, failure of the forum to apply the law of the interested State can be a contravention of the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause of Art. IV, § 1 of the United States Constitution. *See, e.g., Allstate Insurance Co. v. Hague*, 449 U. S. 302 (1981); *Clay v. Sun Insurance Office, Ltd.*, 377 U. S. 179 (1964).

5. *Cf., Colorado River Water Conservation District v. United States*, 424 U. S. 800, 814-15 (1976) (the court should not have abstained from deciding the case because issues of state law were settled).

Even at this juncture, it would be appropriate to stay the decision of the court below to determine, first, whether Illinois law applies under the applicable Massachusetts choice of law principles and, if so, whether the court below should at the very least have stayed its decision pending the outcome of the *Raybestos* case on the ultimate issues.

Under the Rules of Decision Act, a federal court is obligated to apply applicable state law until the matter is no longer *sub judice*. *Huddleston v. Dwyer*, 322 U. S. 232, 236 (1944). It is the duty of the federal trial and appellate courts to ascertain and apply the state law where it controls decision. A federal court must be reversed on appellate review if the state courts have, in the meantime, disapproved their former rulings and adopted different ones. *Id.* at 237. This rationale has been applied even in instances where a federal court in one state is applying the laws of another. *See Nolan v. Transocean Air Lines*, 365 U. S. 293 (1961).[6]

This case involves a number of important state law

6. In any event, *Keene* was incorrect to fashion its own applicable law. The fact that none of the applicable state laws gives specific guidance is no reason to create a federal common law. Federal common law can be fashioned and applied only in specified instances. *Wallis v. Pan American Petroleum Corp.*, 384 U. S. 63 (1966). A significant conflict between some federal policy or interest and the use of state law must first be specifically shown. It is not sufficient to show that Congress could under the Constitution enact a complete code of law governing the transactions in question, or that latent federal power could be exercised to displace state law. That is a decision for Congress. Where there is no significant threat to any identifiable federal policy or interest, federal common law should not be invoked and the court is obligated to implement the state laws to be applied under the choice of law rules of the forum. *Id.*, 384 U. S. at 68. *See also City of Milwaukee v. Illinois*, 451 U. S. 304, 313 (1981).

issues which are developing and changing.[7] Absent this Court's firm application of *Lehman Brothers* and *Louisiana Power and Light* to cases where, as here, many important state doctrines must be considered, the lower federal courts will simply continue to disregard state law and resurrect the federal common law which *Erie, Klaxon* and their progeny interred.

III. Failure to Resolve the Issues Raised Herein Will Lead to Forum-Shopping.

In addition to repealing federal common law in diversity cases, the *Erie* decision was also, in part, a response to forum-shopping. *See Erie,* 304 U. S. at 73-74; *Hanna v. Plumer,* 380 U. S. 460, 467 (1965). Yet because the lower courts have found the choice of law principles so ductile, manufacturers have been able to bring actions

7. As stated above, Massachusetts choice of law rules are changing.

Another troublesome state law issue is the extent to which construction of contracts can be based on administrative convenience. As noted above, the Court of Appeals modified the judgment of the district court to avoid such a result. Yet the same Court of Appeals glossed over the differences between the AMICO policy language and that in the policies of the other insurers. The Court ignored the fact that the parties to the AMICO policy may well have intended a different application of the policy terms than, say, the parties to the Liberty policy. Mere administrative difficulty of applying coverage under different policies issued at different times by different insurers in different ways does not justify reaching results that seek simply to maximize coverage for the insured. Indeed, another court, construing a policy virtually identical to the AMICO policy, in isolation and without considering overall administrative convenience, reached the precise conclusion AMICO advances. *See Commercial Union Insurance Co. v. Pittsburgh Corning Corp., et al.,* No. 81-2129, slip op. (E. D. Pa. Dec. 4, 1981).

in far-away jurisdictions to avoid a less desirable result than the law closer to home might bring. For example, Eagle-Picher clearly avoided Ohio, its home court, and Cincinnati, its home city and that of the Sixth Circuit, in bringing its case to Boston, Massachusetts. Indeed, Eagle-Picher's naming of Liberty in this action borders on collusively invoking the jurisdiction of the Massachusetts federal court, in violation of the underpinnings of 28 U. S. C. § 1359. *See, e. g., National Distillers and Chemical Corp. v. Department of Energy*, 487 F. Supp. 34, 36-37 (D. Del. 1980). Many manufacturers are flocking to the District of Columbia Circuit, for example, in the hopes of having the generous result in *Keene* applied to their insurance contracts.[8] Failure to grant certiorari and to settle the question of how to find the applicable law will allow the growth of the forum-shopping *Erie* sought to end.

---

8. *See, e.g., National Gypsum Co. v. American Motorists Insurance Co.*, No. 82-1332 (D. D. C. filed May 13, 1982) (Texas-based manufacturer's action against its insurers none of whom was incorporated nor had a principal place of business in the District of Columbia); *Eagle-Picher Industries, Inc. v. American Employers Insurance Co.*, No. 82-1841 (D. D. C. filed June 30, 1982) (Eagle-Picher seeks to have *Keene* interpretation applied to excess insurance policies not construed in the instant proceeding). This type of forum-shopping is becoming prevalent not only among manufacturers of asbestos-containing products, but among many insureds who face liability for claims concerning long term exposures to hazardous products. *See, e.g., E. R. Squibb v. American Motorists Insurance Co.*, No. 82-0740 (D. D. C. filed July 21, 1982) (despite construction in prior litigation of policies as applied to coverage for injury resulting from ingestion of DES, manufacturer brought new action seeking application of *Keene* approach).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

STEWART DALZELL
(*Counsel of Record*)
MARK M. WILCOX
TYBE A. BRETT
DRINKER BIDDLE & REATH
1100 PNB Building
Broad & Chestnut Streets
Philadelphia, PA 19107

Counsel for Respondent American Motorists Insurance Company